



6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 81

[EPA-HQ-OAR-2014-0464; FRL-9998-54-OAR]

Error Correction of the Area Designations for the 2010 1-Hour Sulfur Dioxide (SO₂) Primary National Ambient Air Quality Standard (NAAQS) in Freestone and Anderson Counties, Rusk and Panola Counties, and Titus County in Texas

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to correct an error in the designations for three areas in Texas: Freestone and Anderson Counties, Rusk and Panola Counties, and Titus County. On December 13, 2016, portions of Freestone and Anderson Counties, Rusk and Panola Counties, and Titus County were designated as nonattainment for the 2010 primary sulfur dioxide (SO₂) National Ambient Air Quality Standard (NAAQS). Under our Clean Air Act (CAA or Act) authority to correct errors, the EPA is proposing that we erred in not giving greater weight to Texas' preference to characterize air quality through monitoring, and steps undertaken by Texas to begin monitoring in these three areas, when considering all available information; in relying on available air quality analyses in making the initial designations that the EPA recognizes included certain limitations; or a combination of these two issues. Therefore, to correct these errors, the EPA is proposing that the previously designated

nonattainment areas in Freestone and Anderson Counties, Rusk and Panola Counties, and Titus County in Texas each be revised to be designated as unclassifiable.

DATES: Comments must be received on or before **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. Please refer to **SUPPLEMENTARY INFORMATION** for additional information on the comment period.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-HQ-OAR-2014-0464, at <http://www.regulations.gov>. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from regulations.gov. The EPA may publish any comment received to our public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (i.e., on the Web, Cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <https://www2.epa.gov/dockets/commenting-epa-dockets>.

FOR FURTHER INFORMATION CONTACT: For further information concerning this action, please contact Corey Mocka, U.S. EPA, Office of Air Quality Planning and Standards, Air Quality Policy Division, Mail Code C539-01, 109 T.W. Alexander Drive, Research Triangle Park, NC 27709; by telephone at (919) 541-5142 or by email at mocka.corey@epa.gov

SUPPLEMENTARY INFORMATION:

Throughout this document wherever “we,” “us,” or “our” is used, we mean the EPA.

Table of Contents

- I. What is the purpose of this action?
 - A. CAA Legal Authority
 - B. Background on the Designations of Freestone and Anderson Counties, Rusk and Panola Counties, and Titus County in Texas
 - C. Purpose of This Action
- II. Instructions for Submitting Public Comments and Internet Web Site for Rulemaking Information
 - A. Invitation to Comment
 - B. What should I consider as I prepare my comments for the EPA?
 - C. Where can I find additional information for this rulemaking?
- III. Environmental Justice Concerns
- IV. Statutory and Executive Order Reviews
 - A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review
 - B. Executive Order 13771: Reducing Regulations and Controlling Regulatory Costs
 - C. Paperwork Reduction Act (PRA)
 - D. Regulatory Flexibility Act (RFA)
 - E. Unfunded Mandates Reform Act (UMRA)
 - F. Executive Order 13132: Federalism
 - G. Executive Order 13175: Consultation and Coordination with Indian Tribal Government
 - H. Executive Order 13045: Protection of Children from Environmental Health and Safety Risks
 - I. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution or Use
 - J. National Technology Transfer and Advancement Act (NTTAA)
 - K. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations

I. What is the purpose of this action?

A. CAA Legal Authority

Section 110(k)(6) of the CAA, 42 U.S.C. 7410(k)(6), as amended in 1990, provides:

“Whenever the Administrator determines that the Administrator's action approving, disapproving, or promulgating any plan or plan revision (or part thereof), *area designation*, redesignation, classification or reclassification was in error, the Administrator may in the same manner as the approval, disapproval, or promulgation revise such action as appropriate without

requiring any further submission from the state. Such determination and the basis thereof shall be provided to the state and the public.” (Emphasis added.)

We interpret this provision to authorize the agency to make corrections to a promulgated area designation when it is shown to our satisfaction (or we discover) that (1) we clearly erred by failing to consider or by inappropriately considering information made available to the EPA at the time of the promulgation, or the information made available at the time of promulgation is subsequently demonstrated to have been clearly inadequate, and (2) other information persuasively supports a change in the action. *See, e.g.,* 57 FR 56762, 56763 (November 30, 1992) (correcting certain designations, boundaries, or classifications for a variety of NAAQS promulgated in agency actions shortly after the 1990 Clean Air Act amendments).

B. Background on the Designations of Freestone and Anderson Counties, Rusk and Panola Counties, and Titus County in Texas

On June 2, 2010, the EPA Administrator signed a notice of final rulemaking that revised the primary SO₂ NAAQS (75 FR 35520 (June 22, 2010)) after review of the existing primary SO₂ standards promulgated on April 30, 1971 (36 FR 8187). The EPA established the revised primary SO₂ NAAQS at 75 parts per billion (ppb), which is attained when the 3-year average of the annual 99th percentile of daily maximum 1-hour average concentrations does not exceed 75 ppb. 40 CFR 50.17(a)-(b).

The process for designating areas following promulgation of a new or revised NAAQS is contained in the CAA section 107(d) (42 U.S.C. 7407(d)). After promulgation of a new or revised NAAQS, each governor or tribal leader has an opportunity to recommend air quality designations, including the appropriate boundaries for nonattainment areas, to the EPA (42 U.S.C. 7407(d)(1)(A)). The EPA considers these recommendations when fulfilling its duty to

promulgate the formal area designations and boundaries for the new or revised NAAQS. By no later than 120 days prior to promulgating designations, the EPA is required to notify states, territories, and tribes, as appropriate, of any intended modifications to an area designation or boundary recommendation that the EPA deems necessary (42 U.S.C. 7407(d)(1)(B)).

After invoking a 1-year extension of the deadlines to designate areas, as provided for in section 107(d)(1)(B) of the Act, the EPA published an initial round of SO₂ designations for certain areas of the country on August 5, 2013 (referred to as “Round 1”) (78 FR 47191). Following the initial designations, three lawsuits were filed against the EPA in different U.S. District Courts, alleging the agency had failed to perform a nondiscretionary duty under the CAA by not designating all portions of the country by the June 2, 2013, statutory deadline. The state of Texas was a plaintiff or plaintiff-intervenor in two of those cases. In one of those cases (*Sierra Club and NRDC v. McCarthy*, No. 13-cv-3953), the U.S. District Court for the Northern District of California on March 2, 2015, entered an enforceable order for the EPA to complete the area designations by three specific deadlines according to the court-ordered schedule. The court order required the EPA to designate areas containing sources meeting certain criteria no later than July 2, 2016. The three Texas areas the EPA designated that are the subject of this proposed action contained sources meeting those criteria.

To meet the first court-ordered deadline for the next set of SO₂ designations, known as “Round 2,” the final action designating 61 additional areas was signed on June 30, 2016, and a supplemental final action including the designations for portions of Freestone and Anderson

Counties, Rusk and Panola Counties, and Titus County, was signed on November 29, 2016¹ (“Round 2 Supplement”) and published at 81 FR 45039 (July 12, 2016) and 81 FR 89870 (December 13, 2016), respectively. To meet the second court-ordered deadline, all remaining undesignated areas, except those where a state has installed and begun timely operating a new SO₂ monitoring network meeting the EPA specifications referenced in the EPA’s SO₂ Data Requirements Rule, were designated on December 21, 2017, with a supplemental amendment on March 28, 2018 (referred to as “Round 3”) and published at 83 FR 1098 (January 9, 2018) and 83 FR 14597 (April 14, 2018), respectively.² Pursuant to the court-ordered schedule, the EPA must complete SO₂ designations for the remaining areas of the country by December 31, 2020 (referred to as “Round 4”).

On August 21, 2015 (80 FR 51052), the EPA separately promulgated an SO₂ air quality data rule. The Data Requirements Rule (DRR) requires state air agencies to provide additional monitoring or modeling information to characterize SO₂ air quality in areas containing SO₂ emissions sources either meeting certain criteria or that have otherwise been listed under the DRR by the EPA or state air agencies. In lieu of the SO₂ air quality characterization required under the DRR, air agencies could demonstrate that the listed sources restricted their annual SO₂ emissions to less than 2,000 tons per year (tpy) through federally enforceable and in effect emission limits, or provide documentation that the sources had been shut down, by January 13, 2017. Thus, for the purpose of meeting the DRR obligations, states were provided options on

¹ By a series of stipulations of the parties in *Sierra Club and NRDC v. McCarthy* and orders of the Court, the deadline for the three areas in Texas that are the subject of this proposed action, and a fourth area, Milam County, which is not part of this proposed action, was extended to November 29, 2016.

² The remaining undesignated portions of the five Texas counties that are the subject of this notice were designated attainment/unclassifiable in Round 3.

how to characterize their air quality, including setting up and beginning operation of new SO₂ monitoring networks by January 1, 2017. States were required to notify the EPA by July 1, 2016, of which characterization option they had selected for each listed DRR source. Since states were not required under the DRR to complete characterization of air quality in subject areas for purposes of that rule before the Round 2 deadline for the EPA to issue area designations, for those areas – including the three Round 2 Texas areas that are the subject of this proposed action – the EPA did not expect to have the results of the DRR implementation in time for those areas’ designations.

In Freestone County, Big Brown Steam Electric Station (“Big Brown”) was the largest source of SO₂ emissions in the area, but recently and permanently suspended operations as of January 2018, and the majority of its New Source Review (NSR) permits were voided on March 29, 2018, and its operating permit was voided August 3, 2018.³ In Titus County, Monticello Steam Electric Station (“Monticello”) was the largest source of SO₂ emissions in the area, but recently and permanently suspended operations as of February 2018 and the majority of its NSR permits were voided on February 14, 2018 and its operating permit was voided on August 3, 2018.^{4,5} In Rusk County, Martin Lake Electric Station is the largest source of SO₂ emissions in the area and continues to operate. All three facilities are owned by Vistra Energy Corp and its subsidiary Luminant (“Vistra Energy”).

³ See docket item number EPA-HQ-OAR-2014-0464-0455 for a list of Big Brown’s voided NSR permits. Big Brown’s voided operating permit is also located in Docket EPA-HQ-OAR-2014-0464.

⁴ For Monticello, see docket item number EPA-HQ-OAR-2014-0464-0456 for a list of voided NSR permits, and docket item number EPA-HQ-OAR-2014-0464-0457 for the voided operating permit.

⁵ Any remaining NSR or material handling permits for Big Brown and Monticello will only be maintained while the facilities complete closure activities related to coal piles, silos, conveyors, and other shutdown tasks.

In 2011, following the promulgation of the revised NAAQS, the state of Texas initially recommended an unclassifiable designation for Freestone and Anderson Counties, Rusk and Panola Counties, and Titus County since, at the time, there were not any SO₂ monitors in these counties. In September 2015, Texas updated its recommendation to unclassifiable/attainment for areas of the state where there were no monitors, including the above counties. Texas stated its position that ambient air monitoring data were the appropriate information for use in the designation process. In December 2015, prior to the EPA's notification to the Governor of our intended designations, we received air quality modeling from the Sierra Club for these three areas, but we did not receive any other monitoring, modeling, or technical information from Texas or Vistra Energy. In February 2016, the EPA notified Texas of our intended designations of nonattainment for three separate areas covering portions of Freestone and Anderson Counties, Rusk and Panola Counties, and Titus County, based on the modeling submitted by Sierra Club.⁶

During the public comment period in March 2016, the EPA received substantive comments from citizens, Sierra Club, Vistra Energy, the Texas Commission on Environmental Quality (TCEQ), and the Governor of the state of Texas regarding our intended nonattainment designations for these three areas. Summaries of the comments received can be found in the Responses to Significant Comments on the Designation Recommendations for the 2010 Sulfur Dioxide National Ambient Air Quality Standards (NAAQS) – Supplement for Four Areas in Texas Not Addressed in June 30, 2016, Version.⁷ Vistra Energy submitted air dispersion

⁶ See the 120-day letter from the EPA to Texas: <https://www.epa.gov/sites/production/files/2016-03/documents/il-epa-resp-r2.pdf> and the Technical Support Document (TSD) for the intended designations for Texas: <https://www.epa.gov/sites/production/files/2016-03/documents/tx-epa-tds-r2.pdf> ("Intended TSD").

⁷ https://www.epa.gov/sites/production/files/2016-11/documents/rtc_so2_comments_received_document_4_tx_sources_final_0.pdf.

modeling for all three areas, and the Sierra Club submitted updated versions of the modeling previously submitted. The EPA determined that the modeling submitted by Vistra Energy was not representative of current air quality in these areas for several reasons. For example, Vistra Energy's modeling used a non-EPA preprocessor model, AERLIFT, to increase the observed temperatures and velocities of the plumes exiting from the stacks, which the EPA determined was not adequately justified, and, thus, could not be relied upon in the designations decision-making process. The Sierra Club's updated modeling used the latest model version available at the time, in accordance with the general recommendations on modeling provided by the EPA.⁸ Texas did not submit modeling but maintained its position that monitoring of air quality was the proper basis for designating these areas. Concerning the Sierra Club modeling, Texas claimed that this modeling "has errors and clearly overestimates actual SO₂ concentrations."⁹ Full reviews of the modeling received can be found in the Texas Intended TSD¹⁰ and Texas Final TSD¹¹ from Round 2. The final nonattainment designations were based on EPA's analysis of all the air quality modeling submitted by Vistra Energy and Sierra Club, as well as consideration of comments submitted by Texas.

On June 29, 2016, timely meeting its DRR option selection deadline, Texas separately communicated to the EPA that it had chosen the monitoring pathway for these areas to meet its

⁸ See the SO₂ NAAQS Designations Source-Oriented Monitoring Technical Assistance Document at <https://www.epa.gov/sites/production/files/2016-06/documents/so2monitoringtad.pdf>, and the SO₂ NAAQS Designations Modeling Technical Assistance Document at <https://www.epa.gov/sites/production/files/2016-06/documents/so2modelingtad.pdf>.

⁹ Comment submitted on March 31, 2016 by Richard A. Hyde, Executive Director, Texas Commission on Environmental Quality. Docket ID# EPA-HQ-OAR-2014-0464-0294.

¹⁰ <https://www.epa.gov/sites/production/files/2016-03/documents/tx-epa-tds-r2.pdf>.

¹¹ https://www.epa.gov/sites/production/files/2016-11/documents/texas_4_deferred_luminant_tsd_final_docket.pdf.

obligations under that rule to characterize air quality for the sources in these areas that were listed under the DRR. In Texas' annual monitoring network plan for 2016, the state indicated that it intended to site new SO₂ monitors in any Round 2 area that the EPA designated as nonattainment. Following up on this intention, in its 2017 annual monitoring network plan, Texas included new proposed SO₂ monitoring sites in Freestone, Titus, and Rusk Counties to assess air quality in the three new SO₂ nonattainment areas involving Vistra Energy sources. Texas referred to the 2016 Sierra Club modeling analysis, among other information, to inform their proposed siting of the new monitors, but stated: "The use of the 2016 Sierra Club modeling analysis for possible monitor placement decisions does not infer TCEQ's concurrence with the use of this modeling analysis for any other purpose."¹² The EPA approved the three monitor siting proposals in an August 10, 2017, letter to TCEQ.¹³

On February 13, 2017, the state of Texas, TCEQ, and Vistra Energy and its subsidiary companies filed petitions for judicial review of the Round 2 Supplement in the Fifth Circuit Court of Appeals.¹⁴ On that same day, Vistra Energy sent the EPA a petition for reconsideration and administrative stay of EPA's nonattainment designations for Freestone and Anderson Counties, Rusk and Panola Counties, and Titus County. On March 15, 2017, TCEQ also submitted a request for an administrative stay of the Round 2 Supplement. On September 21, 2017, the EPA responded to Vistra Energy's February 2017 petition for reconsideration by

¹² Appendix E: Sulfur Dioxide Data Requirements Rule Monitor Placement Evaluations, from 2017 TCEQ Annual Monitoring Network Plan.

¹³ TCEQ subsequently deployed SO₂ monitors near Big Brown on October 30, 2017, and near Martin Lake on November 1, 2017. No monitors were deployed in the area around Monticello as the source was retired on February 8, 2018 (*see* 2018 TCEQ Annual Monitoring Network Plan).

¹⁴ Sierra Club additionally filed a petition for judicial review of this action in the D.C. Circuit Court of Appeals, which was transferred to the Fifth Circuit on November 2, 2017, and consolidated with the pending petitions.

indicating an intent to undertake an administrative action with notice and comment to revisit the nonattainment designations for the three areas. On October 12, 2017, the Fifth Circuit Court of Appeals granted EPA's motion to place the consolidated challenges to the Round 2 Supplement in abeyance on this basis. In December 2017, TCEQ submitted a new petition for reconsideration and Vistra Energy submitted additional information to support their February 2017 petition for reconsideration. Both submissions in December 2017 provided information regarding the planned retirements of the Big Brown (Freestone/Anderson Counties) and Monticello (Titus County) facilities. Since December 2017, both the Big Brown and Monticello power plants have ceased operations and surrendered their operating permits.

In November 2017, Texas sited an SO₂ monitor at the Martin Lake (Rusk/Panola Counties) power plant. Texas also sited and began operating a monitor around the Big Brown power plant (Freestone/Anderson Counties) on October 30, 2017. The Big Brown power plant shut down in February 2018; however, Texas is currently continuing to operate the monitor. The EPA anticipates that these monitors will not have 3 years of monitoring data necessary to fully evaluate compliance with the SO₂ NAAQS until the end of calendar year 2020. Texas also planned to site a monitor around the Monticello power plant (Titus County), but once the retirement of the facility had been announced, the monitor was not installed.

C. Purpose of This Action

In this document, the EPA is proposing that we erred in failing to give greater weight to the state of Texas' preference to use ambient air monitors to characterize SO₂ air quality in their state for purposes of the designation, when we considered all available information at the time of designation. The EPA has consistently recognized appropriately sited ambient air monitoring data as relevant information for determining an area's designation for the 2010 1-hour SO₂

NAAQS.^{15,16} The EPA's DRR gave states the ability to choose whether to characterize areas around listed sources through modeling or monitoring. It was also the EPA's stated intention in developing the overall implementation strategy for the 2010 SO₂ NAAQS to use the air quality characterizations required under the DRR to inform area designations, where those characterizations were conducted in time to inform the EPA's designations rounds.¹⁷ However, areas required to be designated in Round 2 by the first court-ordered deadline of July 2, 2016, generally were designated before the air quality characterization information required under the DRR became available, and were required to be designated regardless of the state's choice of air quality characterization, including those states that planned to begin operating a new monitoring network in such an area in 2017 in accordance with the DRR.

¹⁵ See "Updated Guidance for Area Designations for the 2010 Primary Sulfur Dioxide National Ambient Air Quality Standard," memorandum to Regional Air Division Directors, Regions I–X, from Stephen D. Page, dated March 20, 2015, available at <https://www.epa.gov/sites/production/files/2016-04/documents/20150320so2designations.pdf>. The EPA supplemented this guidance with documents first made available to states and other interested parties in 2013 and updated in 2016. See SO₂ NAAQS Designations Source-Oriented Monitoring Technical Assistance Document (February 2016), available at <https://www.epa.gov/sites/production/files/2016-06/documents/so2monitoringtad.pdf>, and SO₂ NAAQS Designations Modeling Technical Assistance Document (August 2016), available at <https://www.epa.gov/sites/production/files/2016-06/documents/so2modelingtad.pdf>.

¹⁶ The EPA has relied on monitors, where appropriate, to determine that areas were affirmatively attaining or not attaining the 2010 SO₂ NAAQS in all three rounds of designations. See, e.g., any Round 1 designations (all areas were designated based on monitored data), Round 2 designation for the Gibson County Area in Indiana (<https://www.epa.gov/sites/production/files/2016-03/documents/in-epa-tsd-r2.pdf> and https://www.epa.gov/sites/production/files/2016-07/documents/r5_in_final_designation_tsd_06302016.pdf), and Round 3 designation for the North Denver Area in Colorado (https://www.epa.gov/sites/production/files/2017-08/documents/7_co_so2_rd3-final.pdf).

¹⁷ See "Next Steps on Designating Areas and Implementing the 1-Hour SO₂ Standard – EPA Webinar for State, Local, and Tribal Air Agencies," February 13, 2013, page 2, <https://archive.epa.gov/apti/video/web/pdf/presentation-7.pdf>; Data Requirements Rule for the 1-Hour Sulfur Dioxide Primary NAAQS – Proposed Rule, 79 FR 27446 (May 13, 2014) ("[t]he air quality data developed by the states in accordance with this rulemaking would be used by the EPA in future rounds of area designations for the 1-hour SO₂ NAAQS").

Since 2011, the state of Texas has consistently communicated to the EPA their support of ambient air monitoring data as the appropriate information for use in the designations decisions process for areas in Texas.¹⁸ Because the areas around SO₂ emissions sources in Freestone and Anderson Counties, Rusk and Panola Counties, and Titus County were subject to the Round 2 deadline of July 2, 2016, these areas were required to be designated at that time, regardless of the state of Texas' preference to characterize the areas based on monitoring data and its intention to monitor these areas, given additional time.

However, the EPA is proposing that we erred in failing to give greater weight to the preference of the state to monitor air quality in these areas when considering all available information at the time of designation. Accordingly, in light of the lack of monitoring data available at that time, and Texas' expressed preference at that time for designations of these areas to be based on monitoring data, we are proposing to correct this error by designating the areas as unclassifiable.

The EPA is also proposing a second, independent grounds for error, that we erred in relying on available air quality modeling, in particular modeling submitted by Sierra Club, in making the initial nonattainment designations for these three areas. As noted earlier, the modeling submitted by Vistra Energy, which purported to show attainment, used a non-EPA

¹⁸ Examples of these communications include: TCEQ's 2011 Comments on Guidance for 1-Hour SO₂ NAAQS SIP Submissions at <https://www.regulations.gov/document?D=EPA-HQ-OAR-2010-1059-0034>, TCEQ's 2014 comments regarding Data Requirements for the 1-Hour SO₂ NAAQS at <https://www.regulations.gov/document?D=EPA-HQ-OAR-2013-0711-0051>, Texas' 2016 Round 2 recommendations at <https://www.epa.gov/sites/production/files/2016-03/documents/tx-rec-r2.pdf>, TCEQ's 2016 Annual Monitoring Network Plan at https://www.tceq.texas.gov/assets/public/compliance/monops/air/annual_review/historical/2016-AMNP.pdf, and TCEQ's 2017 Annual Monitoring Network Plan at https://www.tceq.texas.gov/assets/public/compliance/monops/air/annual_review/historical/2017-AMNP.pdf.

preprocessor which constitutes an alternative model for which the state did not secure approval from the EPA per Appendix W to 40 CFR Part 51 – Guideline on Air Quality Models. Also, as noted earlier, the modeling submitted by Sierra Club, which purported to show nonattainment, while developed in accordance with the general recommendations on modeling provided by the EPA, contained key limitations and uncertainties. On one hand, we noted in the Texas Intended TSD and Texas Final TSD from Round 2 that individually these key limitations and uncertainties would not significantly change modeled results or, in many cases, could result in underestimation of SO₂ concentrations.¹⁹ On the other hand, given the possible collective significance of these issues and, in the case of the areas around the Martin Lake and Monticello power plants, given that the maximum modeled concentrations are within about 10% of the primary SO₂ NAAQS, we are less confident in our prior statements that potential adjustments to the Sierra Club modeling would not result in modeled values near or below the NAAQS.²⁰ We, therefore, propose that our error in relying on the Sierra Club modeling represents an insufficient basis for the EPA’s initial nonattainment designations. Accordingly, we are proposing to correct this error by designating the areas as unclassifiable.

One of the most significant limitations and uncertainties with Sierra Club’s modeling is the absence of variable stack conditions and representation of 100 percent load stack parameters. As commenters on the EPA’s proposed designations noted, this issue is particularly pronounced

¹⁹ See the Technical Support Document (TSD) for the intended designations for Texas: https://www.epa.gov/sites/production/files/2016-11/documents/texas_4_deferred_luminant_tsd_final_docket.pdf (“Final TSD”).

²⁰ The maximum predicted 99th percentile 1-hour SO₂ concentrations are 224 µg/m³ for the modeling domain that includes the Martin Lake power plant, and 212 µg/m³ for the modeling domain that includes the Monticello power plant. (The 1-hour SO₂ NAAQS is achieved at 196.4 µg/m³.) The prior TSDs erred in stating that the modeling for Monticello showed concentrations “almost double the standard.”

as the Electric Reliability Council of Texas (ERCOT) market is competitive “with plant dispatch based on variable cost” and falling natural gas prices and renewable capacity resulting in these units running in variable operations.²¹ The EPA noted in the technical support document for the 2016 designations in Indiana that “use of hourly stack parameters more accurately characterize plume characteristics, which will provide greater reliability both in the estimated concentration and in the geographical distribution of concentrations.”²² Other limitations and uncertainties with the Sierra Club modeling identified in the Texas Intended TSD and the Texas Final TSD for the 2016 SO₂ designations include: use of an older version of AERMOD; representation of recent emissions, including controls after the 2011 National Emissions Inventory; inappropriate elevation of flagpole receptors; use of a larger receptor grid than recommended; treatment of building downwash, surface meteorology, hourly wind inputs, potential to emit/allowable emissions, variable stack temperature, and velocity; approach to estimation of background concentrations; and failure to include building downwash and fenceline, or source contribution in the modeling analysis. While individually these deficiencies are not dispositive, collectively they are a sufficient basis for the EPA to propose that we erred in relying on the Sierra Club modeling in making the initial nonattainment designations for the three Texas areas.

This proposed rationale is consistent with related statements by the EPA. The EPA’s March 2011 Guidance explained that given the currently limited network of SO₂ monitors and our expectation that states will not yet have completed appropriate modeling of all significant

²¹ Comment submitted on March 31, 2016 from Kim Mireles, Luminant Generation Company, LLC. Docket ID# EPA-HQ-OAR-2014-0464-0328. ERCOT is the independent system operator responsible for dispatching electricity to the majority of Texas consumers.

²² Technical Support Document for EPA’s Intended Round 2 Area Designations for the 2010 SO₂ NAAQS in Indiana (page 46) at <https://www.epa.gov/sites/production/files/2016-03/documents/in-epa-tsd-r2.pdf>.

SO₂ sources, we anticipated that most areas of the country will be designated “unclassifiable.”²³ The EPA’s updated designations guidance in March 2015 indicated that: “In the absence of information clearly demonstrating a designation of ‘attainment’ or ‘nonattainment,’ the EPA intends to designate areas as ‘unclassifiable’ when it takes action pursuant to the court order.”²⁴ In promulgating revisions to the SO₂ NAAQS in 2010, the EPA stated that where informational records “are insufficient to support initial designations of either ‘attainment’ or ‘nonattainment’ ... EPA is required to issue a designation for the area of ‘unclassifiable.’”²⁵ The EPA also stated that designations would be determined “based on 3 years of complete, quality assured, certified monitoring data”²⁶ and that the EPA would allow for modeling in addition to monitoring (where monitoring was insufficient).²⁷ The Northern District Court of California also stated in regards to the consent decree that the appropriate remedy was to “...require the EPA to issue designations pursuant to a schedule, not to mandate that EPA issue any particular designation.”²⁸

Furthermore, the EPA recognizes that its potential future reliance on properly sited monitors rather than dispersion modeling – as could be the case in a future redesignation of the Martin Lake power plant in Rusk/Panola Counties area and the Big Brown power plant in Freestone/Anderson Counties area – would be consistent with the approach the agency took in 2016 in designating the area around the Gibson power plant in Gibson County, Indiana. The EPA

²³ Memorandum dated March 24, 2011, titled “Area Designations for the 2010 Revised Primary Sulfur Dioxide National Ambient Air Quality Standards,” from Stephen D. Page, Director of EPA’s Office of Air Quality Planning and Standards, to Regional Air Division Directors.

²⁴ <https://www.epa.gov/sites/production/files/2016-06/documents/20150320so2designations.pdf>

²⁵ 75 FR 35571.

²⁶ 75 FR 35570-71.

²⁷ 75 FR 35569.

²⁸ *Sierra Club, et al. v. McCarthy*, 2015 WL 889142 at 11.

has also recognized in other areas that, where conflicting sets of model results exist, the appropriate designation may be “unclassifiable,” depending on the facts of that area.”^{29,30}

Additionally, the EPA is proposing that our error in relying on the Sierra Club modeling along with our error in failing to give greater weight to Texas’ preference for monitoring, represents an insufficient basis for the EPA’s initial nonattainment designations. Accordingly, we are proposing to correct this error by designating the areas as unclassifiable.

The proposed revised designation of unclassifiable indicates that the EPA could not determine based on available information at the time of issuing the designation whether the three Texas areas that are the subject of this proposed action were meeting or not meeting the 2010 SO₂ NAAQS. The EPA is initiating this notice-and-comment process for the public to comment on the EPA’s proposed errors and approach to correct the initial designation for Freestone and Anderson Counties, Rusk and Panola Counties, and Titus County to unclassifiable, rather than nonattainment.

Furthermore, independent from correcting these initial designations, the EPA is proposing to remove the portion of Titus County that was erroneously listed as attainment/unclassifiable on the Texas Part 81 attainment status designations table. As part the

²⁹ See “Technical Analysis for the Sheldon Station, Nebraska Area” in the Technical Support Document for EPA’s Intended Round 2 Area Designations for the 2010 SO₂ NAAQS in Nebraska (page 33) at <https://www.epa.gov/sites/production/files/2016-03/documents/ne-epa-tsd-r2.pdf>, and in the Final Technical Support Document for EPA’s Round 2 Area Designations for the 2010 SO₂ NAAQS in Nebraska (page 11) at https://www.epa.gov/sites/production/files/2016-07/documents/r7_ne_final_designation_tsd_06302016.pdf.

³⁰ See “Technical Analysis for Gallia County, Ohio” in the Technical Support Document for the EPA’s Intended Round 2 Area Designations for the 2010 SO₂ NAAQS in Ohio (page 19) at <https://www.epa.gov/sites/production/files/2016-03/documents/oh-epa-tsd-r2.pdf>, and in the Technical Support Document for EPA’s Final Round 2 Area Designations for the 2010 SO₂ NAAQS in Ohio (page 8) at https://www.epa.gov/sites/production/files/2016-07/documents/r5_oh_final_designation_tsd_06302016.pdf.

Round 3 final designations rule published on January 9, 2018 (83 FR 1098), the EPA inadvertently listed a portion of Titus County (i.e., the portion that is not being designated as part of this proposed action nor the previous Round 2 final action) as attainment/unclassifiable. Consistent with the rulemaking records, the remaining portion of Titus County should not have been listed as attainment/unclassifiable in the part 81 table.³¹ EPA will designate the remaining Titus County area by December 31, 2020 during the Round 4 designations process.

II. Instructions for Submitting Public Comments and Internet Web Site for Rulemaking Information

A. Invitation to Comment

The purpose of this document is to solicit input from the public on EPA's error in designating portions of Freestone and Anderson Counties, Rusk and Panola Counties, and Titus County as nonattainment, and the corrected designations of unclassifiable.

Please be as specific as possible in supporting your views.

- Describe any assumptions and provide any technical information and/or data that you used.
- Provide specific examples to illustrate your concerns, and suggest alternatives.
- Explain your views as clearly as possible.
- Provide your input by the comment period deadline identified.

Previous submissions and supporting technical analyses utilized for the initial Round 2 designations can be found at <https://www.epa.gov/sulfur-dioxide-designations> and, also, in the public docket for these SO₂ designations at Docket ID No. EPA-HQ-OAR-2014-0464. Air

³¹ For examples, see Table 2 in the Round 3 final designations TSD for Texas at <https://www.epa.gov/sites/production/files/2017-12/documents/39-tx-so2-rd3-final.pdf> and footnote #3 of the Texas Part 81 table.

dispersion modeling input and output files are too large to post in the docket or on the Web site and must be requested from the EPA Docket Office or from the contact listed in the **FOR FURTHER INFORMATION CONTACT** section. The EPA Docket Office can be contacted at (202) 566-1744, and is located at EPA Docket Center Reading Room, WJC West Building, Room 3334, 1301 Constitution Avenue, NW, Washington, DC 20004. The hours of operation at the EPA Docket Center are 8:30 a.m. - 4:30 p.m., Monday-Friday.

The EPA invites public input on this proposed action regarding error correction of the designations of the Freestone and Anderson Counties, Rusk and Panola Counties, and Titus County areas during the 30-day comment period provided in this document. In order to receive full consideration, input from the public must be submitted to the docket by **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. At this time, the EPA is not asking for public comment on areas beyond the three areas that are the subject of this proposed action. In addition, in finalizing this action the EPA will not revisit comments relating to the designations for these three areas in Texas received in previous public comment periods. (The agency has already responded to these comments in the previous designations actions.) This opportunity for public comment does not affect any rights or obligations of any state, territory, or tribe, or of the EPA, which might otherwise exist pursuant to the CAA section 107(d).

Please refer to the **FOR FURTHER INFORMATION CONTACT** section in this document for specific instructions on submitting comments and locating relevant public documents.

B. What should I consider as I prepare my comments for the EPA?

1. *Submitting CBI.* Do not submit CBI information to the EPA through <https://www.regulations.gov> or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI in any digital storage media that you mail to the EPA, mark the outside of the digital storage media as CBI and then identify electronically within the digital storage media the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 Code of Federal Regulations (CFR) part 2. Send or deliver information identified as CBI only to the following address: Tiffany Purifoy, OAQPS CBI Officer, U.S. EPA, Office of Air Quality Planning and Standards, Mail Code C404-02, Research Triangle Park, NC 27711, telephone (919) 541-0878, email at purifoy.tiffany@epa.gov, Attention Docket ID No. EPA-HQ-OAR-2014-0464.

2. *Tips for Preparing Your Comments.* When submitting comments, remember to:

- Identify the rulemaking by docket number and other identifying information (subject heading, *Federal Register* date and page number).
- Follow directions.
- Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

C. *Where can I find additional information for this rulemaking?*

All documents in the docket are listed in the www.regulations.gov index, identified by Docket ID No. EPA-HQ-OAR-2014-0464, and on the agency's SO₂ Designations Web site at <https://www.epa.gov/sulfur-dioxide-designations>. Although listed in the index, some information

is not publicly available, *e.g.*, CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in www.regulations.gov or in hard copy at the EPA Docket Center. Air dispersion modeling input and output files are too large to post in the docket or on the website and must be requested from the contact listed in the **FOR FURTHER INFORMATION CONTACT** section. The EPA Docket Center can be contacted at (202) 566-1744, and is located at EPA Docket Center Reading Room, WJC West Building, Room 3334, 1301 Constitution Avenue NW., Washington, DC 20004. The hours of operation at the EPA Docket Center are 8:30 a.m.-4:30 p.m., Monday-Friday.

III. Environmental Justice Concerns

When the EPA establishes a new or revised NAAQS, the CAA requires the EPA to designate all areas of the United States as either nonattainment, attainment, or unclassifiable. This proposed action would correct an error in the nonattainment designations for Freestone and Anderson Counties, Rusk and Panola Counties, and Titus County in Texas for the 2010 SO₂ NAAQS. Area designations address environmental justice concerns by ensuring that the public is properly informed about the air quality in an area. In locations where air quality does not meet the NAAQS, the CAA requires relevant state authorities to initiate appropriate air quality management actions to ensure that all those residing, working, attending school, or otherwise present in those areas are protected, regardless of minority and economic status.

IV. Statutory and Executive Order Reviews

A. *Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review*

This action is exempt from review by the Office of Management and Budget because it is proposing to correct an error in previously promulgated designations for portions of Freestone and Anderson Counties, Rusk and Panola Counties, and Titus County in Texas for the 2010 1-hour SO₂ NAAQS.

B. Executive Order 13771: Reducing Regulations and Controlling Regulatory Costs

This action is not an Executive Order 13771 regulatory action because actions such as error corrections of air quality designations associated with a new revised NAAQS are exempt under Executive Order 12866.

C. Paperwork Reduction Act (PRA)

This action does not impose an information collection burden under the PRA. In this action, the EPA is correcting the SO₂ NAAQS designations for portions of Freestone and Anderson Counties, Rusk and Panola Counties, and Titus County in Texas promulgated previously on December 13, 2016, and does not contain any information collection activities.

D. Regulatory Flexibility Act (RFA)

This proposed error correction action under CAA section 110(k)(6) is not subject to the RFA. The RFA applies only to rules subject to notice-and-comment rulemaking requirements under the Administrative Procedure Act (APA), 5 U.S.C. 553, or any other statute. Section 107(d)(2)(B) of the CAA explicitly provides that designations are exempt from the notice-and-comment provisions of the APA. In addition, designations under CAA section 107(d) are not among the list of actions that are subject to the notice-and-comment rulemaking requirements of CAA section 307(d).

E. Unfunded Mandates Reform Act (UMRA)

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C.

1531–1538 and does not significantly or uniquely affect small governments. The action imposes no enforceable duty on any state, local, or tribal governments or the private sector.

F. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. The division of responsibility between the federal government and the states for purposes of implementing the NAAQS is established under the CAA.

G. Executive Order 13175: Consultation and Coordination with Indian Tribal Government

This action does not have tribal implications, as specified in Executive Order 13175. This action concerns the designation of portions of Freestone and Anderson Counties, Rusk and Panola Counties, and Titus County in Texas for the 2010 SO₂ NAAQS. The CAA provides for states, territories, and eligible tribes to develop plans to regulate emissions of air pollutants within their areas, as necessary, based on the designations. The Tribal Authority Rule (TAR) provides tribes the opportunity to apply for eligibility to develop and implement CAA programs, such as programs to attain and maintain the SO₂ NAAQS, but it leaves to the discretion of the tribe the decision of whether to apply to develop these programs and which programs, or appropriate elements of a program, the tribe will seek to adopt. This rule does not have a substantial direct effect on one or more Indian tribes. It would not create any additional requirements beyond those of the SO₂ NAAQS. This rule, if finalized, would revise the designations for portions of Freestone and Anderson Counties, Rusk and Panola Counties, and Titus County in Texas for the SO₂ NAAQS, but no areas of Indian country are intended to be designated by this action. Furthermore, this rule does not affect the relationship or distribution of

power and responsibilities between the federal government and Indian tribes. The CAA and the TAR establish the relationship of the federal government and tribes in developing plans to attain the NAAQS, and this rule does nothing to modify that relationship. Thus, Executive Order 13175 does not apply.

H. Executive Order 13045: Protection of Children from Environmental Health and Safety Risks

The EPA interprets Executive Order 13045 as applying to those regulatory actions that concern environmental health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of “covered regulatory action” in section 2-202 of the Executive Order. This action is not subject to Executive Order 13045 because it does not establish an environmental standard intended to mitigate health or safety risks.

I. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution or Use

This action is not subject to Executive Order 13211 because it is not a significant regulatory action under Executive Order 12866.

J. National Technology Transfer and Advancement Act (NTTAA)

This rulemaking does not involve technical standards.

K. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations

The EPA believes that this action does not have disproportionately high and adverse human health or environmental effects on minority populations, low-income populations and/or indigenous peoples, as specified in Executive Order 12898 (59 FR 7629, February 16, 1994). The documentation for this determination is contained in Section IV of this preamble, “Environmental Justice Concerns.”

List of Subjects in 40 CFR Part 81

Environmental protection, Air pollution control, National parks, Wilderness areas.

Dated: August 13, 2019.

Anne L. Idsal,

Acting Assistant Administrator.

[FR Doc. 2019-18048 Filed: 8/21/2019 8:45 am; Publication Date: 8/22/2019]